BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DEBRA K. DAVIS	)	
Claimant	)	
	)	
VS.	)	
	)	
SOUTHWIND RESIDENTIAL SERVICES	)	
Respondent	)	Docket No. 1,016,380
	)	
AND	)	
	)	
TRAVELERS INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the July 13, 2005, preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

The Administrative Law Judge (ALJ) found that claimant's April 4, 2005, accident was a natural and probable consequence of claimant's September 25, 2002, work-related injury and, therefore, the resulting injury is compensable. The ALJ also found that Dr. John Estivo, claimant's authorized treating physician, recommended chronic pain management for claimant. Respondent did not provide claimant with this treatment, and claimant sought treatment with Dr. Pedro Murati. Dr. Murati referred claimant to Dr. Gery Hsu, and the ALJ found that Dr. Hsu should be treated as authorized pursuant to that referral. The ALJ ordered that Dr. Hsu shall continue to be claimant's authorized treating physician for all treatment, tests and referrals, except referrals to rehabilitation hospitals. The ALJ ordered respondent to pay all authorized and related medical expenses regarding the April 4, 2005, injury, including surgery performed by Dr. Hsu on May 31, 2005. The ALJ also ordered that respondent pay Dr. Murati's bills as authorized medical treatment. Finally, the ALJ ordered that claimant is entitled to receive payment of temporary total disability compensation at the rate of $224.95 per week beginning April 5, 2005, and continuing until claimant is released to substantial and gainful employment.

The respondent requests review of whether claimant suffered an accidental injury arising out of and in the course of her employment and whether proper notice was given.

Claimant requests that the ALJ's order be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant worked for respondent as a certified nurse assistant. While working for respondent, in July 2002, claimant underwent a bilateral L5 laminectomy performed by Dr. Hsu. She claimed no work injury and workers compensation did not pay for this surgery.

On September 25, 2002, claimant was helping a co-worker lift a patient out of a shower chair into a bed when her back popped. Claimant bent over and could not move, and the co-worker helped her to the kitchen to fill out an incident report. Respondent accepted the claim as compensable and authorized Dr. Hsu as claimant's treating physician. Dr. Hsu performed surgery on claimant in June 2003, and respondent paid for her medical treatment with Dr. Hsu and paid her temporary total disability (TTD) benefits.

Claimant testified that she had problems after the second surgery and that some of the screws in her back had broken. The respondent changed her authorized treating physician from Dr. Hsu to Dr. Jacob Amrani. Dr. Amrani determined that claimant needed surgery to repair the broken screws in her back, and on March 8, 2004, claimant again underwent low back surgery. When claimant awoke from this surgery, she could not move her right foot. Claimant developed a medical condition called foot drop. Because of the foot drop, claimant has difficulty walking and frequently falls.

Respondent next sent claimant to Dr. Estivo. Dr. Estivo ordered some x-rays and a nerve conduction test, and ordered a brace for claimant's right leg. Dr. Estivo released claimant from treatment as having reached maximum medical improvement on September 8, 2004. However, Dr. Estivo recommended that claimant have chronic pain management by a pain specialist. Respondent did not authorize any physician to provide this treatment to claimant.

Claimant's attorney sent claimant to Dr. Murati for a rating on January 13, 2005. Dr. Murati, using the AMA *Guides*[1], rated claimant as having a 17 percent whole person

[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

impairment. Claimant continued to see Dr. Murati after the examination for pain management.

On April 5, 2005, claimant was stepping onto a curb when she tripped and fell, landing on her buttocks and right side. She did not have her leg brace on. She went to the emergency room the next day. The emergency room records indicate that claimant had called Dr. Murati after the fall, and Dr. Murati advised her to go to the emergency room for pain medication to get her by until he could see her.

Claimant states that Dr. Murati referred her to Dr. Hsu, and claimant saw him on April 20, 2005. Dr. Hsu ordered a myelogram, and after seeing the report of the myelogram, Dr. Hsu thought claimant needed another surgery. On May 13, 2005, claimant saw Dr. Hsu and agreed to a fourth surgical procedure on her back. Claimant did not want Dr. Amrani to do the surgery, and Dr. Hsu performed the surgery on May 31, 2005. Dr. Hsu wrote a note on May 25, 2005, indicating that claimant was not able to work from April 5, 2005, until released from treatment.

At the preliminary hearing, claimant asked for a change of authorized treating physician from Dr. Amrani to Dr. Hsu. Claimant contends the surgery of May 31, 2005, was performed on an emergent basis and, although she used her state-issued medical card to pay for the medical treatment she received from Dr. Hsu, she asked the ALJ to order respondent to pay any outstanding medical bills and expenses of the surgery. She also requested respondent pay TTD benefits after April 5, 2005, until released to return to work. The ALJ agreed and authorized Dr. Hsu to be claimant's treating physician, ordered respondent to pay the medical expenses claimant incurred with both Dr. Hsu and Dr. Murati, and ordered respondent to pay TTD benefits to claimant.

Respondent argues that claimant's accident of April 5, 2005, was not a natural and probable consequence of her September 25, 2002, accident but was a subsequent or intervening event or injury. Respondent noted that Dr. Estivo released claimant from treatment in September 2004 as having reached maximum medical improvement. Respondent also noted that claimant had received permanent partial disability ratings from both Dr. Murati and Dr. Estivo before the April 5, 2005, fall. Respondent also points out that on April 11, 2005, six days after claimant's fall, claimant certified to the ALJ that she was at maximum medical improvement. Respondent further argues that if the fall of April 5, 2005, qualified as a new accidental injury, claimant failed to timely report the accident to respondent.

In addition, respondent contends that claimant's surgery was not done on an emergent basis. Respondent claims that there is no medical records or other documentary evidence revealing an emergency. The surgery was scheduled on May 13, 2005, and performed on May 31, 2005. Respondent also states that Dr. Hsu's records indicate that claimant's pain had improved between her initial visit on April 20, 2005, and the May 13, 2005 visit. Dr. Hsu's records actually note that on April 20, 2005, claimant rated her pain

at 8.5 on a scale of on 1 to 10 with 10 being the most severe and on May 13, 2005, claimant rated her pain as being between 7 and 8.

Respondent asserts the ALJ accepted claimant's testimony with no medical evidence or records that Dr. Estivo had prescribed pain management and that Dr. Amrani had evaluated the claimant in May 2005 and opined that claimant needed a fourth surgery. There are no reports from Dr. Estivo or Dr. Amrani attached as exhibits in the preliminary hearing. Claimant's attorney has provided a report from Dr. Estivo of September 8, 2004, as an attachment to claimant's brief filed August 24, 2005. However, the Board will not consider that report as it was not part of the record before the ALJ. K.S.A. 44-555c provides that "review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings **as presented, had and introduced before the administrative law judge**." (Emphasis added.)

There is no mention of claimant falling or of foot drop after her first non-work related back surgery. The first mention of claimant falling is after her second surgery. Respondent concedes "the falls caused the pedicle screws to break necessitating a third surgery"[2] and that claimant "continued to fall after the third surgery with Dr. Amrani."[3] It is undisputed that those surgeries were due to claimant's work related injury and were compensable. What is disputed is that the April 5, 2005, fall that occurred outside claimant's aunt's house nevertheless arose out of and in the course of employment as it was a direct consequence of claimant's original September 25, 2002, accident and injury at work. Claimant relates her falls to her foot drop condition and the numbness in her foot. Both of these conditions occurred following surgery for her work-related injury.

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*[4], the Kansas Supreme Court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman*[5], the court attempted to clarify the rule:

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[2]Respondent's brief at 10 (filed Aug. 22, 2005).

[3]*Id.* at 10.

[4]*Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

[5]*Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig*[6], the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber*[7], the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."

Here, the Board finds this circumstance to be more akin to that found in *Gillig*, rather than *Stockman*. Claimant's back condition never completely resolved. Although claimant had been rated and released by the treating physicians, her pain, lack of mobility and foot drop conditions were ongoing.

The Board finds that claimant's injuries resulting from her April 5, 2005, fall are compensable as a direct consequence of her September 25, 2002 work-related injury. At this juncture of the proceedings, the Board is without jurisdiction to address the respondent's remaining concerns about TTD, medical and the ALJ's naming an authorized treating physician.[8]

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated July 13, 2005, is affirmed.

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[6] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

[7] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 728, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

[8] *See* K.S.A. 44-534a(a)(2) and K.S.A. 44-551(b)(2)(A).

IT IS SO ORDERED.

Dated this _____ day of October, 2005.

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BOARD MEMBER

c: Brian D. Pistotnik, Attorney for Claimant
William L. Townsley, III, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director